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No. 207

IN THE

Supreme Court of the United States

October Term, 1961.

ARLENE COATS, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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IN THE

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No.

ARLENE COATS, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon,
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v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Arlene Coats, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on January 12, 1962.

OPINION BELOW.

The opinion of the Court of Claims (App. p. 14) is reported at 297 F. 2d 546.

JURISDICTION.

The judgment of the Court of Claims was entered on January 12, 1962 (Tr. p. 58). A timely motion for rehearing was denied April 4, 1962 (Tr. p. 88). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTIONS PRESENTED.

1. A price adjustment article in a supply contract provided that ". . . If . . . the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article entitled 'Disputes'," and the standard Disputes article of such contract provided for decision by the contracting officer of factual disputes and an appeal to the Secretary "whose decision shall be final and conclusive upon the parties." The Secretary's decision was received by petitioner on January 5, 1950. Under the Court's decisions in *United States v. Moorman*, 1950, 338 U. S. 457, decided January 9, 1950, and *United States v. Wunderlich*, 1951, 342 U. S. 98, decided November 26, 1951, the Secretary's decision on petitioner's claim was final and conclusive absent fraud. The petitioner does not aver that the Secretary's decision was fraudulent or so grossly erroneous as to imply bad faith but only that the Secretary's decision "was arbitrary and capricious and not supported by substantial evidence." The question presented is whether under the contract provisions petitioner could have brought suit on any other ground than that the Secretary's decision was fraudulent.

2. Whether the Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. 321, which provided that the administrative decision ". . . shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." established a new standard for judicial review viz. "not supported by substantial evidence."

3. Whether the Court's decision in *United States v. Wunderlich*, supra, on November 26, 1951, did not apply to the Secretary's decision rendered in petitioner's case on

January 5, 1950, so that plaintiff could have brought suit at any time prior to the *Wunderlich* decision on the ground that the Secretary's determination "was arbitrary and capricious and not supported by substantial evidence."

4. Whether the Act of May 11, 1954, 68 Stat. 81, the Wunderlich Statute, did nothing more than restore the remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious or whether the Act of May 11, 1954, 68 Stat. 81, adopted the additional remedy of seeking review of the Army's decision on the ground that it was not supported by substantial evidence.

STATUTORY AND CONTRACT PROVISIONS INVOLVED.

1. The Act of May 11, 1954, 68 Stat. 81 (Wunderlich Statute), 41 U. S. C. 321, 322, provides:

> §321. Limitation on pleading contract-provisions relating to finality; standards of review
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such a contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The "Revision of Price" article in pertinent part, and the "Disputes" article of the contract provide (Tr. 1, 2):

"14. REVISION OF PRICE:

"(a) The prices fixed herein may be increased or decreased in accordance with this Article.

* * * * * * * * *

"(e) Disagreements.—If . . . the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article entitled 'Disputes', and the prices so fixed shall remain in effect for the balance of the contract notwithstanding any other provision of this Article."

* * * * * * * * *

"ARTICLE 16. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall mail to the Contractor a written notification of his determination. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties. Pending decision of a dispute hereunder the

Contractor shall diligently proceed with the performance of this contract."

STATEMENT.

This action arose out of petitioner's claim to recover the difference between the unit price of $19.00 claimed for the 125,000 overcoats delivered and the unit price of $15.29 actually paid plaintiff for the manufacture of such 125,000 overcoats for the Army. The decision by the Court of Claims was rendered upon motions for summary judgment and there are no findings. The opinion of the Court of Claims does not recite the facts in the petitioner's case but in a companion case (*Cosmopolitan Manufacturing Co. v. The United States*, No. 168-60) which is not before the Court. The petition (Tr. pp. 1-4) discloses the following facts:

In June 1946 petitioner and respondent entered into a contract for the manufacture of 125,000 Army overcoats with removable liner and the initial price as adjusted by modification not in dispute was $19.00 each for total consideration of $2,375,000.

The contract provided for price revision, that if the respondent's contracting officer and petitioner failed to agree to revised prices, such disagreement should be deemed a question of fact to be disposed of in accordance with the article entitled Disputes, and the Disputes article provided that disputes concerning questions of fact should be decided by the contracting officer and for appeal to the Secretary of War whose decision should be final and conclusive upon the parties. After a dispute arose, the contracting officer rendered a finding of fact and decision under the Disputes article fixing the contract prices at $15.05 per unit and $1,881,250 as total contract price. Upon timely

appeal, the Secretary of the Army, Successor to the Secretary of War, fixed the unit price at $15.29 and total contract price at $1,911,250. That decision of the Secretary was received by the plaintiff on January 5, 1950, which was its effective date (see *Sachs v. United States*, 1945, 104 Ct. Cl. 372, 395). The present action filed April 11, 1960, claims $19.00 per unit for said 125,000 overcoats less the amount paid by the respondent at $15.29 per unit or difference of $463,750 on the ground that petitioner is entitled to recover the amounts due and paid under fixed price subcontracts of $15.00 per overcoat plus $1.30 per unit for bias binding, trimmings and findings, and $2.70 per unit for petitioner's overhead and profit on the ground that since there was no fraud, the decision of the Secretary was final and binding upon petitioner when received January 5, 1950, and not subject to judicial review; that petitioner had no right of action until the Act of May 11, 1954 supra (Wunderlich Statute), was enacted and thereunder judicial review was provided to the petitioner upon petitioner's allegation that the decision of the Secretary of the Army "was arbitrary and capricious and not supported by substantial evidence." The Court of Claims decided that the Act of May 11, 1954, "did nothing more than . . . restore [the] remedy . . . of seeking review of the Army's decision on the ground that it was arbitrary and capricious" (Tr. p. 56) and that petitioner, who received the Secretary's decision on January 5, 1950, "could have brought suit at any time prior to the *Wunderlich* decision on the ground that the Secretary's determination was arbitrary, capricious or so grossly erroneous as to imply bad faith" (Tr. p. 56). *Note*: petitioner only alleged in its petition that the Secretary's decision was "arbitrary and capricious and not supported by substantial evidence." There is no allegation or evidence that the Secretary's decision was "so grossly erroneous as to imply bad faith." The Court of Claims dismissed plain-

tiff's petition on the ground that it was barred by the statute of limitations.

REASONS FOR GRANTING THE WRIT.

1. Insofar as it rests upon the holding that the Act of May 11, 1954, 68 Stat. 81 (Wunderlich Statute), 41 U. S. C. 321 "did nothing more than . . . restore [the] remedy . . . of seeking review of the Army's decision on the ground that it was arbitrary and capricious" (App. p. 17), the decision of the Court of Claims is in square conflict with *Lowell O. West Lumber Sales v. United States*, 9 Cir. 1959, 270 F. 2d 12; *Wells & Wells, Inc. v. United States*, 8 Cir. 1959, 269 F. 2d 412; *Hoffman v. United States*, 10 Cir. 1960, 276 F. 2d 199; *United States v. A. J. McKinnon*, 9 Cir. 1961, 289 F. 2d 908; *United States v. Hamden Co-operative Creamery Co.*, 2 Cir. 1961, 297 F. 2d 130, 134; *United States National Bank of Portland v. United States*, D. Ore. 1959, 178 F. Supp. 910; *Mann Chemical Laboratories, Inc. v. United States*, D. Mass. 1958, 174 F. Supp. 563; *Union Painting Co. v. United States*, D. Alaska 1961, 194 F. Supp. 803.

The conflict arising between the decisions of the Court of Claims and the decisions of the Courts of Appeals arises from the view taken of the phrase "not supported by substantial evidence" in the Act of May 11, 1954, supra, the Wunderlich Statute. The Court of Claims' viewpoint, as precisely illustrated by the decision below (App. p. 17):

> "Although the *Wunderlich* decision took away plaintiff's remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious, this remedy was restored by the Act of May 11, 1954 (68 Stat. 81). That Act did nothing more than this, that is,

to restore this remedy. *Volentine and Littleton, Contractors v. United States*, supra."

inverprets the Act of May 11, 1954, supra (Wunderlich Statute) to permit a complete new trial before the Court, with introduction of new evidence, in contract cases appealed from administrative Boards. The Courts of Appeals, however, limit review to solely a review of the administrative record and not a trial *de novo*: *Wells and Wells, Inc. v. United States, supra*, 269 F. 2d at page 415; *Lowell O. West Lumber Sales v. United States*, supra, 270 F. 2d at page 19; *United States v. A. J. McKinnon*, supra, 289 F. 2d at page 909.

This conflict arises because the Court of Claims views "not supported by substantial evidence" in the Act of May 11, 1954, supra (Wunderlich Statute) as adding nothing to the review granted by the Court of Claims before *United States v. Wunderlich*, supra, was decided November 26, 1951. The Courts of Appeals and the District Courts take the view that the phrase "not supported by substantial evidence" in the Act of May 11, 1954 supra (Wunderlich Statute) requires that review by the Court shall consist solely of a review of the administrative record and not a trial *de novo*.

The decision below pinpoints this issue squarely.

The decision below negates "not supported by substantial evidence" in the Act of May 11, 1954 supra (Wunderlich Statute) and states that the Wunderlich Statute did nothing more than restore the pre-*Wunderlich* decision remedy.

The Court below said (App. p. 16):

> "It is clear that Congress did not intend to grant any new right of action by the Act of May 11, 1954. In *Volentine and Littleton, Contractors v. United States, supra*, we held it merely intended to restore the *status quo ante* the *Wunderlich* decision."

The legislative history confirms the view of the Courts of Appeals that "substantial evidence" is a new judicial remedy under the Wunderlich Statute. House Report No. 1380, Committee on the Judiciary, 83d Congress, 2d Sess. (Congressional Record, page 3674):

> "A principal change which the amendment effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official vested with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in Ripley v. United States, 223 U. S. 695, 32 S. Ct. 352. The standards of arbitrariness and capriciousness in relation to the review of administrative action were also prescribed in the Administrative Procedures Act (act of June 11, 1946, ch. 324, sec. 10, 60 Stat. 243; 5 U. S. C. 1009). There is a wealth of judicial precedent behind these standards of review and it is the committee's belief that they should not be abandoned.
>
> "The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence. The requirement that administrative action be supported by substantial evidence is found in the Administrative Procedures Act, supra. As understood by the committee and as interpreted by the Supreme Court in Consolidated Edison Company of New York v. National Labor Relations Board, 305 U. S. 197, 229, 59 S. Ct. 206, 'substantial evidence' means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'

"The inclusion of the standard 'not' supported by substantial evidence' should also correct another condition arising out of the lack of uniformity between the various departments and agencies concerned in the appellate hearing procedures under the disputes clause. It has been brought to light in public hearings that it is the exception rather than the rule that contractors in the presentation of their disputes are afforded an opportunity to become acquainted with the evidence in support of the Government's position. It is believed that if the standard of substantial evidence is adopted this condition will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal."

This conflict between the decisions of the Courts of Appeals and the District Courts on the one hand and the Court of Claims on the other hand is acknowledged by the Courts: See *United States v. Hamden Co-operative Creamery Co.*, supra, 297 F. 2d at page 134; and see *H. L. Yoh Co. v. United States* (Ct. Cl.), 1961, 288 F. 2d 493, 496.

It is submitted that this case squarely presents the conflict between the decisions of the Court of Claims and the decisions of the Courts of Appeals and the District Courts. The confusion upon the question and the conflict of the decisions should be cleared by a determination of this Court.

2. The construction of the Act of May 11, 1954, supra (Wunderlich Statute) has not as yet been before the Court.

The meaning of the statutory phrase "not supported by substantial evidence" is of utmost importance and clarification should be accomplished by this Court's granting review in this case. The case involves a decision on an important question of Federal law not yet decided by this Court.

3. Insofar as it rests upon the holding that plaintiff "could have brought suit at any time prior to the *Wunderlich* decision" (App. p. 16) the decision of the Court of Claims is in square conflict with *United States v. Wunderlich*, 1951, 342 U. S. 98; *United States v. Moorman*, 1950, 338 U. S. 457; and *United States v. McShain*, 1939, 308 U. S. 512, 520. Petitioner herein did not allege fraud and did not allege that the Secretary's determination was so grossly erroneous as to imply bad faith. Petitioner's petition only alleged that the decision of the Secretary of the Army "was arbitrary and capricious and not supported by substantial evidence." The Court of Claims has adhered to the rule which it announced prior to the Court's decision in *United States v. McShain*, supra, in 1939, prior to the decision in *United States v. Moorman*, supra, in 1950, and prior to the decision rendered by the Court in *United States v. Wunderlich*, supra, in 1951. The Court of Claims is consistent. It ruled in *McShain v. United States*, 1939, 88 Ct. Cl. 284, that the plaintiff there had a contractual right of action. This Court reversed: *United States v. McShain*, supra. It ruled in *Moorman v. United States*, 1949, 113 Ct. Cl. 159, that the plaintiff there had a contractual right of action. This Court reversed: *United States v. Moorman*, supra. It ruled in *Wunderlich v. United States*, 1950, 117 Ct. Cl. 92, that the plaintiff there had a contractual right of action. This Court reversed: *United States v. Wunderlich*, supra. In ruling that the plaintiff below had a contractual right of action the decision of the Court below is in square conflict with this Court's

decisions in *United States v. McShain*, *United States v. Moorman, and United States v. Wunderlich*, supra. It is submitted that this adds a ready reason for review and reversal by this Court.

4. Insofar as it rests upon the holding that the decision of the Court in *United States v. Wunderlich*, supra, rendered November 26, 1951, has no application to an administrative decision effective January 5, 1950, the decision of the Court of Claims is in square conflict with the Separation of Powers doctrine. The decision below rests upon a confusion between a judicial and a legislative act, in ascribing to a judicial act the limitation that it prescribes what the law shall be in future cases arising under it. See *Sinking Fund Cases*, 1878, 99 U. S. 700, 761; *Prentis v. Atlantic Coast Line*, 1908, 211 U. S. 210, 226; *Kihlbourn v. Thompson*, 1880, 103 U. S. 168. It is submitted that this is an additional ground for review.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWIN J. McDERMOTT,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF CLAIMS.

(Decided January 12, 1962.)

No. 168-60.

COSMOPOLITAN MANUFACTURING CO. v. THE UNITED STATES.

No. 123-60.

ARLENE COATS, A PARTNERSHIP CONSISTING OF SIDNEY BERKENFELD AND BENJAMIN PREPON, v. THE UNITED STATES.

EDWIN J. McDERMOTT for plaintiffs.

MARY J. TURNER, with whom was ASSISTANT ATTORNEY GENERAL WILLIAM H. ORRICK, JR., for defendant.

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT.

Per Curiam: These are two separate suits to recover the difference between the original contract price and the price actually paid plaintiffs by defendant for the manufacture of overcoats for the Army. They are before the court on defendant's motions for summary judgment grounded on the allegation that the suits are barred by the statute of limitations. Plaintiffs have also filed motions for summary judgment.[1]

Since all the issues presented in the case of *Arlene Coats v. United States*, No. 123-60, are identically presented in the case of *Cosmopolitan Manufacturing Co. v. United States*, No. 168-60, and since a decision in the latter case is dispositive of both cases, we confine our opinion to a discussion of the facts and law involved in No. 168-60.

Plaintiff's petition alleges that in 1946, it entered into a contract with defendant for the manufacture of overcoats for the Army at a unit price of $17.50. Under the terms of the contract a revised price was to be negotiated after 40 percent of the overcoats had been delivered. If the parties could not agree upon a revised price, after the prescribed percentage of overcoats had been delivered, the contracting officer was authorized to determine the price to be paid. The parties could not agree; whereupon the contracting officer determined that a unit price of $15.00 was fair and reasonable.

Plaintiff appealed from this decision to the Army Board

[1] Plaintiffs subsequently moved for leave to withdraw their motions for summary judgment. We denied their motions for leave to withdraw on December 15, 1961.

of Contract Appeals, which, on June 23, 1948, found $16.56 to be the proper unit price. The decision of the board was approved by the Secretary of the Army on June 25, 1948.

Plaintiff has been paid for 34,000 of the 35,000 overcoats delivered under the contract at a price of $16.56 per unit. Plaintiff's subcontractor manufactured the remaining 1,000 overcoats for which the price of $15.40 per unit, the price agreed to by the subcontractor, was paid. In this suit, plaintiff seeks to recover the difference between the price paid it for the 35,000 overcoats and the original contract price of $17.50 per unit.

It is clear that plaintiff cannot recover because its claim is barred by the statute of limitations.

Plaintiff grounds its claim on the alleged arbitrary and capricious action of the Army Board of Contract Appeals, and its approval by the Secretary of the Army. It follows that plaintiff's cause of action, if any, accrued at the time the appeals board acted, all events having occurred which were necessary to fix the liability of defendant and entitle plaintiffs to bring suit. *Empire Institute of Tailoring, Inc. v. United States*, 142 Ct. Cl. 165; *Levine v. United States*, 133 Ct. Cl. 774; *Sese v. United States*, 125 Ct. Cl. 526; *Gray v. United States*, 124 Ct. Cl. 313; *Reliance Motors, Inc. v. United States*, 112 Ct. Cl. 324.

But plaintiff says that it had no right to bring suit at that time because of the decision of the Supreme Court in *United States v. Wunderlich*, 342 U. S. 98, holding that the courts did not have the power to review the decision of the head of a department unless it was alleged and shown that his decision was fraudulent, and plaintiff says it expressly exonerated defendant of fraud. However, that decision was rendered on November 26, 1951, more than three years after plaintiff's cause of action accrued on June 25, 1948. There is no question but that plaintiff could have brought suit at any time prior to the *Wunderlich* decision on the ground that

the secretary's determination was arbitrary, capricious, or so grossly erroneous as to imply bad faith. *Silas Mason Co. v. United States*, 90 Ct. Cl. 266. Cf. *Palace Corp. v. United States*, 124 Ct. Cl. 545, *cert.* denied 346 U. S. 815; *Volentine and Littleton, Contractors v. United States*, 136 Ct. Cl. 638.

Although the *Wunderlich* decision took away plaintiff's remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious, this remedy was restored by the Act of May 11, 1954 (68 Stat. 81). That Act did nothing more than this, that is, to restore this remedy. *Volentine and Littleton, Contractors v. United States, supra.* The fact that, in the interim between the *Wunderlich* decision on November 26, 1951, and the date of its restoration on May 11, 1954, plaintiff could not have pursued the remedy it now seeks to pursue, affords it no relief from the running of the statute of limitations, because plaintiff's cause of action first accrued more than three years prior to the *Wunderlich* decision. *De Arnaud v. United States*, 151 U. S. 483; *Whitney's Admn'x v. United States*, 18 Ct. Cl. 19; *Marcos v. United States*, 122 Ct. Cl. 641. Suit still had to be brought within six years from the date plaintiff's cause of action first accrued, which was no later than June 25, 1948.

Title 28 U. S. C. §2501, as amended by the Act of September 3, 1954, 68 Stat. 1246, provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.
>
> * * * * * * * * * *
>
> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.
>
> * * * * * * * * * *

In *Soriano v. United States*, 352 U. S. 270, the Supreme Court held that Congress in prescribing this limitation period meant just that period and no more and that even the existence of a state of war between this country and Japan, which prevented plaintiff from filing his claim, did not toll the running of the statute. Since plaintiff did not bring its suit until April 11, 1960, almost twelve years after its claim first accrued, it is clearly barred.

It is clear that Congress did not intend to grant any new right of action by the Act of May 11, 1954. In *Volentine and Littleton, Contractors v. United States, supra*, we held it merely intended to restore the *status quo ante* the *Wunderlich* decision. This purpose could not have been expressed more clearly than in the committee report accompanying the "Wunderlich" bill. H. R. 1380, 83d Cong., 2d Sess., states in pertinent part:

> The purpose of the proposed legislation, as amended, is to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich*, (342 U. S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers.
>
> A principal change which the amendment [which became the Wunderlich Act] effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official vested with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in *Ripley v. United States*, (223 U. S. 695). * * *

There is a wealth of judicial precedent behind these standards of review and it is the committee's belief that they should not be abandoned.

* * * * * * * * *

The committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, with the exception of the standards of review therein prescribed. Under the terms of the standard disputes clause the decision of the contracting officer is final unless the contractor appeals within 30 days * * * [Emphasis supplied].

The statute of limitations regarding claims against the United States is jurisdictional and prevents the consideration of a claim which is more than 6 years old. Claims less than 6 years old, and not heretofore filed in the courts *may, if filed, receive the protection of the proposed legislation.* In this way the basic requirement of the contract that an appeal be noted to the head of the department within 30 days, as well as the protection which the Government receives under the statute of limitations applicable to these matters, have been retained. [Emphasis supplied.]

Plaintiff seeks to amend its petition to assert as an alternative contention that the decision of the Board of Contract Appeals and the Secretary of the Army did not become final for some 10 or 11 years after the decision was made, because there was pending before the Board a motion for reconsideration. Thus, plaintiff says that the statute of limitations was tolled during this period.

The alleged motion consists of a letter from a successor contracting officer to the board calling the attention of the latter to the fact that 1,000 of the 35,000 units delivered

under the contract were manufactured by plaintiff's subcontractor, which had agreed to accept a price per unit lower than that found by the Secretary. The board was advised that an amount representing the difference in price on the 1,000 overcoats was being withheld and it was, therefore, "requested that the decision of the Secretary of the Army be reconsidered." This letter was never acted upon; the board did not reopen the case; it did not disturb its former decision. The making of a request for reconsideration does not deprive the former decision of finality; it is the granting of the request that does so. This request was not granted, so far as the record shows.

Defendant's motions for summary judgment are granted; plaintiffs' like motions are denied; plaintiff's motion to amend its petition in case No. 168-60 is denied, and plaintiffs' petitions in cases Nos. 168-60 and 123-60 will be dismissed.

It is so ordered.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 207

ARLENE COATS, A PARTNERSHIP CONSISTING OF SIDNEY BERKENFELD AND BENJAMIN PREPON, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. pp. 14–20) is reported at 297 F. 2d 546.

JURISDICTION

The order of the United States Court of Claims dismissing the petition was entered on January 12, 1962. A petition for rehearing, timely filed, was denied on April 4, 1962. The petition for a writ of certiorari was filed on June 25, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in light of the six-year statute of limitations governing suits filed in the Court of Claims, that Court properly dismissed an action first brought by petitioner in 1960 in order to set aside a 1949 decision of the Armed Services Board of Contract Appeals.

STATUTES AND CONTRACT PROVISIONS INVOLVED

1. Section 2501, Title 28, United States Code, in pertinent part provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

2. The Wunderlich Act of May 11, 1954, c. 199, § 1, 68 Stat. 81, 41 U.S.C. 321, provides:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

3. Contract No. W30-280-QM-2753 in pertinent part provides:

14. REVISION OF PRICE:

(a) The prices fixed herein may be increased or decreased in accordance with this Article.

* * * * *

(e) Disagreements.—If * * * the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article entitled "Disputes", and the prices so fixed shall remain in effect for the balance of the contract notwithstanding any other provision of this Article.

* * * * *

ARTICLE 16. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall mail to the Contractor a written notification of his determination. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract.

STATEMENT

On June 28, 1946, petitioner and the Department of the Army entered into contract No. W30–280–QM–2753 for the manufacture and purchase of 125,000 overcoats at a unit price of $19.25. By Supplemental Agreement dated November 29, 1946, the unit

price was reduced to $19.00. The contract contained a price revision article, which provided that if the petitioner and the government's contracting officer were unable to agree upon revised prices, such would be deemed a disagreement as to a question of fact to be disposed of in accordance with the "Disputes" article. That article provided for the initial determination of the dispute by the Contracting Officer, with a right of "appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties." (*Supra,* p. 3.)

Pursuant to the "Revision of Price" article, petitioner submitted required cost data for examination by the Contracting Officer. Having been unable to reach an agreement with the petitioner as to revised prices, the Contracting Officer, on December 5, 1947, after making appropriate findings, fixed the unit price at $15.05. In supplemental findings of fact the Contracting Officer, on April 6, 1949, reaffirmed the propriety of that unit price. On December 14, 1949, timely appeal having been taken, the Armed Services Board of Contract Appeals recommended to the Secretary of the Army, successor to the Secretary of War, that the unit price be fixed at $15.29. This decision of the Board was approved and adopted by the Secretary on December 21, 1949.

The Petitioner has been paid for the 125,000 overcoats delivered under the contract at a price of $15.29 per unit, or $1,911,250 in all. The present suit was filed by petitioner against the United States in the Court of Claims on April 11, 1960, or more than 10½ years after the 1949 decision established the unit price

at $15.29. In this suit, petitioner, challenging that decision, seeks to recover the difference between the price paid it for the 125,000 overcoats and the original contract price of $19 per unit. Summary judgment was entered in favor of the United States. The Court of Claims noted in a *per curiam* opinion that "It is clear that [petitioner] cannot recover because its claim is barred by the statute of limitations." 297 F. 546, 547.

ARGUMENT

The Court of Claims was clearly correct in deciding that petitioner's claim was barred because it was not filed within the six-year period provided by 28 U.S.C. 2501. There is, accordingly, no occasion for further review by this Court.

1. It has long been settled that when Congress consents to suit against the United States, the express statutory limitations and conditions governing such suits are an integral part of the Congressional consent and must be strictly observed. *Soriano* v. *United States*, 352 U.S. 270, 276; *McMahon* v. *United States*, 342 U.S. 25, 27; *United States* v. *Sherwood*, 312 U.S. 584, 587. Indeed, "no rule is better settled than that the United States cannot be sued except when Congress has so provided" (*Ickes* v. *Fox*, 300 U.S. 82, 96) and that its liability "cannot be extended beyond the plain language of the statute authorizing it." *Price* v. *United States and Osage Indians*, 174 U.S. 373, 376; *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686.

The pertinent statute here, authorizing the institution of suit against the United States in the Court of

Claims, provides: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501.

Petitioner's claim accrued on December 21, 1949, the date on which—all of the contractual events having occured—petitioner could have first instituted suit.[1] *Ball* v. *United States*, 137 F. Supp. 740 (Ct. Cls.), certiorari denied, 352 U.S. 827. Accordingly, the six-year period of limitations expired on December 20, 1955. Since the present suit was not filed until 1960, the court below was plainly required to dismiss it as time barred.

In an endeavor to escape the explicit six-year period of limitations, petitioner contends that the Wunderlich Act, enacted in May, 1954, *supra* p. 2, automatically extended the period of limitations for another six-year period, or at least until May, 1960.[2] The short answer is that there is nothing in the Wunderlich Act even suggesting such an extension of the limitation period. And *Soriano* v. *United States*, 352 U.S. 270, makes it plain that there will be no tolling

[1] The decision of the Armed Services Board of Contract Appeals was approved by the Secretary of the Army on December 21, 1949.

[2] The acceptance of this argument would require the allowance of a new six-year limitations period in regard to suits against the United States each time an allegedly new remedy is afforded private claimants, no matter how stale the claim. In any event, petitioner—between May 1954, when the act was passed, and December 20, 1955—could have instituted an action within the six-year period prescribed by 28 U.S.C. 2501. But petitioner failed to do so, filing suit first in 1960.

or extension unless Congress expressly provides for it.

2. The other argument raised in the petition (Pet. 8–11) concerns an asserted conflict in the lower courts as to whether, under the Wunderlich Act, the reviewing court may upset the administrative determination without regard to the evidence adduced before the administrative authority and solely on the basis of *de novo* evidence presented to the court. But this problem is in no way involved in the present case. All that is involved here, certainly at this stage of the litigation, is the propriety of the ruling below that petitioner's claim was not timely filed. That ruling, we have shown, is clearly correct.

CONCLUSION

For the foregoing reasons, we respectfully subinit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 207

ARLENE COATS, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon,
Petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. THE COURT OF CLAIMS ERRED IN DECIDING THAT PETITIONER'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS, AND ITS DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

The Court of Claims was clearly erroneous in deciding that petitioner's claim was barred because not filed within

the six-year period provided by 28 U.S.C. 2501, and there is accordingly occasion for further review by this Court. In so deciding the Court of Claims' decision was in direct conflict with decisions of this Court.

It is submitted that the essence of statutes of limitations is that the time begins to run under them as to causes of action only after the right to prosecute such causes of action to a successful conclusion has accrued in a shape to be effectually enforced.

In *United States v. Wurts*, 1938, 303 U.S. 414, 418:

> "We are of opinion that Congress did not intend the limitations of §610 to run against the Government until the Government's right 'has accrued in a shape to be effectually enforced.' "

In *Borer v. Chapman*, 1887, 119 U.S. 587, 602:

> "It cannot be the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced."

The issue here is not as respondent contends (Opposition Brief, p. 5), whether the Wunderlich Statute, Act of May 11, 1954, c. 199, §1, 68 Stat. 81, 41 U.S.C. 321, extended any limitation period. The issue is only as to whether petitioner's right to prosecute the cause of action to a successful conclusion accrued on December 21, 1949 as respondent contends.

The decisions cited by respondent in support of its contention, Opposition Brief, p. 6, are not in point. *Soriano v. United States*, 1957, 352 U.S. 270, concerned a claim by a Philippine resident that the existence of hostilities in the Philippines tolled the statute of limitations. *McMahon v. United States*, 1951, 342 U.S. 25 concerned a claim by an

injured seaman that the two year limitation of the Suits in Admiralty Act, §5, 41 Stat. 526, 46 U.S.C. §745, was tolled during administrative consideration of his claim. *United States v. Sherwood*, 1941, 312 U.S. 584, concerned a suit by a judgment creditor in a District Court to recover damages from the United States for breach of its contract with the judgment debtor. *Ickes v. Fox*, 1937, 300 U.S. 82, concerned a suit by owners of land within a Federal irrigation project to compel the Secretary of Interior to irrigate their lands. *Price v. United States and Osage Indians*, 1899, 174 U.S. 373, concerned an action to recover the value of oxen driven away by Indians belonging to the Osage Tribe. *Eastern Transp. Co. v. United States*, 1927, 272 U.S. 675, concerned a libel in admiralty by the owner of a barge damaged in collision with a ship owned by the United States and used solely as a merchant vessel due to a channel way not being marked with a buoy or beacon by day or a lighted lantern by night. None of the cases rule on the issue here involved which is the date when petitioner's right to prosecute its cause of action to a successful conclusion accrued.

Respondent contends (Opposition Brief, p. 6) that petitioner's claim accrued on December 21, 1949, when the Secretary of the Army approved the decision of the Armed Services Board of Contract Appeals rendered on petitioner's timely appeal from the contracting officer's decision under the Disputes article, and that on that date petitioner could first have instituted suit. *Ball v. United States*, 1956, 133 Ct. Cl. 841, 137 F. Supp. 740, cert. den., 1956, 352 U.S. 827, cited by respondent (Opposition Brief, p. 6) is not in point. *Ball v. United States, supra*, concerned an action to recover pay lost through alleged illegal reductions in grade where the claimant contended that the statute of limitations was tolled while proceedings were pending in a District Court for injunction relief, issued by the District Court, vacated on appeal, and upon remand, dismissed for lack of prosecu-

tion; the Court of Claims ruling that the claimant's right of action accrued at the time of the demotion when all the events had occurred which fixed the liability of the United States to claimant and entitled claimant to sue thereon. The issue involved here is whether when the Secretary's decision was rendered December 21, 1949, and communicated to petitioner January 5, 1950,[1] such decision was final and conclusive upon petitioner so that petitioner had no right to prosecute an action to a successful conclusion until the Wunderlich Statute, *supra*, was enacted on May 11, 1954. Hence, we submit, *Ball v. United States, supra*, is not in point.

Respondent contends that petitioner could have instituted suit when the decision of the Armed Services Board of Contract Appeals was approved by the Secretary of the Army on December 21, 1949. But petitioner's contract provided that "*If . . . the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Articles entitled 'Disputes'*" and the "DISPUTES" article provided: "*. . . all disputes concerning questions of fact which may arise under this contract . . . shall be decided by the Contracting Officer . . . Within 30 days . . . the Contractor may appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties.*" (Petition, pp. 5, 6).

Respondent on May 6, 1939, filed petition to writ of certiorari to the Court of Claims in *The United States of America, petitioner v. John McShain, Inc.*, October Term,

[1] The Secretary's decision not being communicated to petitioner on December 21, 1949, and not being a matter of public record could not be effective until made known to petitioner on January 5, 1950: See *Brooks-Callaway Co. v. United States*, 1943, 97 Ct. Cl. 689, 702-706, decision of March 1, 1943, after remand by this Court in *United States v. Brooks-Callaway Co.*, 1943, 318 U.S. 120; *Austin Engineering Co., Inc. v. United States*, 1942, 97 Ct. Cl. 68, 80.

1938, No. 940 (Continued to October Term, 1939, No. 43) and contended therein (p. 6):

> "The Court of Claims in this case has substituted its judgment, on a question as to the proper interpretation of plans and specifications, for the judgment of the contracting officer and the Secretary of the Treasury, to whom the final decision of questions had been committed by specific provisions of the contract and specifications. In failing to give effect to these provisions, the decision is in conflict with the applicable decisions of this Court. *Kihlberg* v. *United States*, 97 U.S. 398, 402; *Martinsburg & Potomac R.R. Co.* v. *March*, 114 U.S. 549, 553-554; *Plumley* v. *United States*, 226 U.S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U.S. 387, 393."

This Court in *United States v. McShain*, 1939, 308 U.S. 512, 520, reversed the Court of Claims.

Respondent also on June 3, 1949, filed petition for writ of certiorari to the Court of Claims in *The United States, petitioner v. Jeff W. Moorman and James C. Moorman, co-partners, Doing Business as J. W. Moorman & Son*, October Term, 1948, No. 837 (Continued to October Term, 1949, No. 97), and contended therein (pp. 8, 9):

> "The dispute arose in the instant case because the contractor considered work demanded of him to be outside the requirements of the contract. Paragraph 2-16 of the specifications, which are expressly incorporated in the contract by Article I (R. 1-2), provides that 'If the contractor considers any work demanded of him to be outside the requirements of the contract' he shall protest to the contracting officer. If not satisfied with the decision of the contracting officer, the contractor may

appeal to the Secretary of War 'whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract.' *Supra*, p. 3.. In making its own determination of the work required by the contract plans and specifications, the Court of Claims has substituted its judgment for that of the Secretary of War to whom the final decision of this precise question had been specifically committed by the unambiguous provisions of the specifications.

"In failing to give effect to these contract provisions, the decision presents a square conflict with the applicable decisions of this Court. *United States* v. *McShain, Inc.*, 308 U.S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U.S. 387, 393; *Plumley* v. *United States*, 226 U.S. 545, 547; *Martinsburg & Potomac R.R. Co.* v. *March*, 114 U.S. 549, 553-554; *Kihlberg* v. *United States*, 97 U.S. 398, 402."

This Court on October 10, 1949, granted certiorari: *United States v. Moorman*, 1949, 338 U.S. 810; and on January 9, 1950, reversed the Court of Claims: *United States v. Moorman*, 1950, 338 U.S. 457.

Respondent also on February 28, 1951, filed petition for writ of certiorari to the Court of Claims in *The United States, petitioner v. Martin Wunderlich, Ann W. Wunderlich, Marie Wunderlich, E. Murielle Wunderlich, and Theodore Wunderlich, a partnership, trading under the name of Martin Wunderlich Company*, October Term, 1950, No. 584 (Continued to October Term, 1951, No. 11) and contended therein (pp. 13, 14):

"In so far as the court's characterization of the administrative determination as 'arbitrary and capricious' and 'grossly erroneous' means that such determination may be set aside even if it concerns questions

> of fact, the holding is, we submit, a plain misapplication of the settled rule that decisions under Article 15, 'in the absence of fraud or of mistake so gross as to necessarily imply bad faith, . . . will not be subjected to the revisory power of the courts.' *United States* v. *Gleason*, 175 U.S. 588, 602; *United States* v. *Moorman* 338 U.S. 457, 460, 462."

This Court on May 7, 1951, granted certiorari, *United States v. Wunderlich*, 1951, 341 U.S. 924, and on November 26, 1951, reversed the Court of Claims: *United States v. Wunderlich*, 1951, 342 U.S. 98, saying, p. 100: "*So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.*" Petitioner before the Court of Claims averred in its petition (Tr. pp. 1-4) that there was no fraud but that the administrative decision was "*arbitrary and capricious and not supported by substantial evidence.*"

Clearly respondent cannot urge upon this Court that petitioner's right to prosecute its claim to a successful conclusion accrued in a shape to be effectually enforced when the decision of the Armed Services Board of Contract Appeals was approved by the Secretary of the Army on December 21, 1949. Respondent in *United States v. McShain*, supra; and *United States v. Wunderlich*, supra, urged upon this Court that under contract provisions similar to those present here (Petition, pp. 5, 6) a contractor is bound finally and conclusively by the administrative determination. This Court so decided: *United States v. Wunderlich*, supra; *United States v. Moorman*, supra; *United States v. McShain*, supra.

If the statute of limitations did not begin to run on December 21, 1949 then it does not matter as suggested in

Opposition Brief, p. 6, footnote 2, that petitioner did not institute its action by December 20, 1955. The statute of limitations did not begin to run on December 21, 1949. Petitioner was then finally bound by the administrative determination and had no right to prosecute an action to a successful conclusion.

This action by petitioner on a claim where the administrative determination was made within 6 years prior to the enactment of the Wunderlich Statute, supra, on May 11, 1954, and upon which suit was instituted within 6 years after May 11, 1954, was within the contemplation of the Congress.

In House Report No. 1380, 83d Congress, 2d Session (Congressional Record, p. 3674) the Committee stated:

> "The statute of limitations regarding claims against the United States is jurisdictional and prevents the consideration of a claim which is more than 6 years old. *Claims less than 6 years old, and not heretofore filed in the Courts may, if filed, receive the protection of the proposed legislation.*" [Italics supplied]

Petitioner's claim was less than 6 years old when the Act of May 11, 1954 (Wunderlich Statute), *supra*, was enacted and this action was filed in the Court of Claims within 6 years after the Act of May 11, 1954, *supra*. Hence petitioner's suit when filed is entitled to receive the protection of the "proposed" legislation. It was within the contemplation of the Wunderlich Statute.

Thus in *MacInnis v. United States*, 1932, 75 Ct. Cl. 538, 542, a suit instituted May 5, 1931, to recover the difference in pay of a lieutenant and a lieutenant, junior grade, for the period July 1 to December 20, 1918, by virtue of an assignment on December 20, 1918, from the grade of lieutenant, junior grade, to the provisional grade of lieu-

tenant, was held to be timely since the right of action did not accrue until the enactment of the Act of May 23, 1930, 46 Stat. 375, had validated his provisional appointment.

It is submitted that respondent was erroneous in asserting that the Court of Claims was clearly correct in deciding that petitioner's claim was barred because it was not filed within the 6 year period provided by 28 U.S.C. 2501. Clearly petitioner's action was timely since it was not until the Wunderlich Statute was enacted on May 11, 1954, that petitioner's right to prosecute its cause of action to a successful conclusion had accrued. The decision below is in square conflict with this Court's decisions. Review and reversal, we submit, are required.

2. THIS CASE SQUARELY PRESENTS THE ISSUE OF "*substantial evidence*" UNDER THE WUNDERLICH STATUTE AS TO WHICH THE DECISIONS OF THE COURT OF CLAIMS ARE IN CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEALS AND THE DISTRICT COURTS.

Respondent contends (Opposition Brief, p. 7) that there is not involved in this case the conflict in the lower courts as to whether under the Wunderlich Statute, *supra*, the reviewing court may upset the administrative determination without regard to the evidence adduced before the administrative authority and solely on the basis of de novo evidence presented to the court. Certainly the Court below regarded this issue as pertinent since it said (Appendix, pp. 17, 18):

> "Although the Wunderlich decision took away plaintiff's remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious, this

remedy was restored by the Act of May 11, 1954, (68 Stat. 81). That Act did nothing more than this, that is, to restore this remedy. *Volentine and Littleton, Contractors* v. *United States, supra.*

* * *

"It is clear that Congress did not intend to create any new right of action by the Act of May 11, 1954. In *Volentine and Littleton, Contractors* v. *United States*, supra, we held it merely intended to restore the status quo ante the Wunderlich decision."

This ruling was necessary to the decision of the Court below. Had the Court below acknowledged that the Act of May 11, 1954, Wunderlich Statute, *supra*, created a new standard of review, a new right of action in "substantial evidence", it would not have dismissed petitioner's action, since clearly a right of action based upon the new standard of review, "substantial evidence", could not have arisen until May 11, 1954, when the Wunderlich Statute, *supra*, was enacted, and petitioner's suit filed April 11, 1960, was timely.

The Committee on the Judiciary, House Report No. 1380, 83d Cong., 2d Sess., *supra*, said:

"The committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, *with the exception of the standards of review* therein prescribed." [Italics supplied]

It is the standard of review of "*substantial evidence*" which created the new right that the petitioner sought to enforce below.

It is on this precise point that the decisions of the Court of Claims are in direct conflict with the decisions of the Courts of Appeals and the District Courts cited on page

8 of the petition. The Courts of Appeals and the District Courts assert that Congress by use of the phrase "*substantial evidence*" clearly intended to limit the reviewing Court to the evidence adduced before the administrative authority, whereas the rule in the Court of Claims is as the Court of Claims stated in *Fehlhaber Corporation v. United States*, 1957, 138 Ct. Cl. 571, 577, 151 F. Supp. 817, 821:

> "The only thing we must decide now is whether the decision of the Corps of Engineers Claims and Appeals Board, approved by the Chief of Engineers, is supported by substantial evidence adduced at the trial *de novo* before this court notwithstanding the administrative record."

and in *Carlo Bianchi and Company, Inc. v. United States*, 1959, 144 Ct. Cl. 500, 506, 169 F. Supp. 514, 517:

> "In our opinion in *Volentine and Littleton* v. *United States*, 136 C. Cls. 638, holding that the trial in this court should not be limited to the record made before the contracting agency, but should be *de novo*, we recognized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case."

Respondent filed petition for writ of certiorari to the United States Court of Claims in *The United States, Petitioner v. Fehlhaber Corporation*, October Term, 1957, No. 472, and there contended that the Court of Claims in overturning the administrative decision on the basis of evidence presented to the Court at a de novo hearing was in conflict with the Act of May 11, 1954, Wunderlich Statute, *supra*, and with decisions of other Courts. At that time, 1957, the

decisions of the Courts of Appeals and the District Courts, cited in the petition, page 6, had not been decided. The only decision rendered in the Courts of Appeals and cited by respondent in its petition in *United States v. Fehlhaber, supra*, was *Langoma Lumber Corporation v. United States*, 1956, 232 F.2d 886. In *Langoma Lumber Corporation v. United States*, the District Court at 140 F. Supp. 460, 461, 462, had found that the decision of the Armed Services Board of Contract Appeals was supported by substantial evidence in the record made before the Board but the Court of Appeals in affirming the District Court's decision expressly avoided any decision interpreting the meaning of "substantial evidence" as used in the Wunderlich Statute, *supra*, or in laying down the procedure to be followed in determining the existence of "substantial evidence". The Court of Appeals at 232 F.2d 886, 887 said:

> "Nor do we find in the case any necessity of trying to enunciate precisely whether 'substantial evidence' used as a canon in the review of administrative proceedings has the same meaning in all types of review."

This Court on November 18, 1957, denied certiorari: *United States v. Fehlhaber Corp.*, 1957, 355 U.S. 87. It has been suggested that at the time it was not clear that the Court of Claims granted *de novo* review. In *Eight Years After Wunderlich—Confusion in the Courts*, 28 George Washington Law Review 561, 578:

> "Notwithstanding the fact that the Solicitor General declined to seek a writ of certiorari in the *Volentine and Littleton* and *Carlo Bianchi* cases, although he was strongly urged to do so,[78] it is suggested that grounds which are more procedurally obvious, if no more fundamental, now exist for seeking a Supreme Court clari-

fication. A statement by the Supreme Court of the course to be pursued would force an alignment of judicial thinking."

"*Footnote*":

"The Civil Division, Department of Justice and the Department of the Army (the agency in interest) urged petition for a writ. How much the Solicitor General's refusal to seek a writ was influenced by his unsuccessful petition in Fehlhaber Corp. v. United States, 138 Ct. Cl. 571, 151 F. Supp. 817 (1957), *cert. denied*, 355 U. S. 877 (1957), is subject to speculation. In that case, the Judge Advocate General of the Army maintained upon petition that the Court of Claims' decision, if left to stand, would have 'far-reaching implications upon Government procurement', would subject every ASBCA case to *de novo* review in the Court of Claims, and would permit every contractor to appeal 'merely by alleging there was not substantial evidence' to support the ASBCA decision. The respondent, in his answer, maintained that the Court of Claims did not give de novo review. Perhaps that contention influenced the Supreme Court. Since then, it has not only become obvious that the Court of Claims does—consciously—grant a de novo review, but, in addition, there is the impending split among the circuits and the Court of Claims."

It is submitted that this case presents precisely for review by this Court the issue which the respondent asked the Court to review in *United States v. Fehlhaber Corp.*, supra, and that whereas when *United States v. Fehlhaber Corp.*, supra, was before this Court there was not the conflict between the decisions of the Court of Claims and deci-

sions of the Courts of Appeals and the District Courts, such conflict does now exist.

It is respectfully submitted that this case does present for decision by this Court the issue as to whether the Wunderlich Statute, Act of May 11, 1954, *supra*, in establishing "*substantial evidence*" as a standard of review limits the reviewing Court to a review of the administrative record alone as the Courts of Appeals and the District Courts have decided or permits a completely new trial with introduction of new evidence as the Court of Claims has decided.

It is submitted that this conflict in the decisions requires clarification by this Court and that this case squarely presents the issue for decision by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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Attorney for petitioner